FILE COPY

FILED
JUN 2 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 789

MARGARET DE KORWIN, Individually, and as Executrix of the Estate of Joseph Maria de Korwin, deceased, and JOHN EDWARD SULLIVAN,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF CHICAGO, a National banking association, individually, and as Trustee of the Estate of Otto Young, deceased, et al.,

Respondents.

BRIEF OF RESPONDENT, THE FIRST NATIONAL BANK OF CHICAGO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDWARD R. JOHNSTON,
J. F. DAMMANN,
HAROLD V. AMBERG,
JOHN W. KEARNS,
Attorneys for Respondent, The First National Bank of Chicago.

The Scheffer Press, Inc.—FInancial 6-2694

INDEX

PAGE

Opinions below 2
Jurisdiction 2
Record 3
Statutes Involved 3
Question Presented 4
Statement of Facts 5
History of this litigation 7
Argument 14
(I) Plaintiff's petition assumes the answer to a question of Illinois law which has been decided adversely to her assumption 14
(II) The issue of validity of the 1933 consolidation was not properly raised below 26
(III) Whether a consolidation is in contravention of the law of a state is a question of state law 29

CASES CITED.

Adams v. Atlantic Natl. Bank, 155 So. 648 (Fla. 1934) 26
Albers v. McNichols, 301 Ill. App. 551, 558 (1930) 24
Blair v. Oesterlein Co., 275 U. S. 220, 225 (1927) 28-29
Casey v. Galli, 94 U. S. 673 (1876) 19-21
C. & E. I. R. R. Co. v. Doyle, 256 Ill. 514, 522 (1912) 24
Chicago Title & Trust Co. v. Zinser, 264 Ill. 31 (1914) 11, 24, 25-26
Citizens and Southern Natl. Bank v. Connor, 11 S. E. 2d (S. Car., 1940) 26
Davis v. Elmira Savings Bank, 161 U. S. 75 (Pet. 12) 28
Duignan v. United States, 274 U. S. 195, 200 (1927) 29
Ex Parte Worcester National Bank, 279 U. S. 347 ..... (1929) 24, 28

PAGE

Ex Parte Leaf Tobacco Board of Trade, 222 U. S. 578, 581 13

First Natl. Bank v. Harry E. Chapman Co., 22 SW. (2d) 245 (Tenn., 1929)..... 26

Garment Workers v. Donnelly Co., 304 U. S. 243, 249 (1938) 28

Hofheimer v. Seaboard Citizens Natl. Bank of Norfolk, 154 Va. 896, cert. denied 283 U. S. 855 (1931) 29

Hopkins Fed. Savings & Loan Assn. v. Cleary, 296 U. S. 315, 341-343 (1935).....16, 19-21

Knights of Pythias v. Meyer, 265 U. S. 30 (1924)..... 28

Leffingwell v. Warren, 2 Black 599 (1862)..... 28

Lindberg et al. v. The First National Bank of Chicago, 293 Ill. App. 474, appeal denied 293 Ill. xlv, cert. denied 305 U. S. 636.....15-18, 29

McRoberts v. Minier, 270 Ill. App. 1, 10 (1933)..... 14

Mercantile Trust Co. v. San Joaquin Agricultural Corp., 265 Pac. 583 (Calif., 1928)..... 26

People v. Union Building & Loan Assn., 59 Pac. 692.. 13

Stevens v. First National Bank and Trust Co., 173 Ga. 332, cert. denied 284 U. S. 684 (1932)..... 29

In re Watkins Estate, 113 Vt. 126, cert. denied 319 U. S. 757 (1943)..... 29

Western & Atl. R. Co. v. Henderson, 279 U. S. 639 (1929) 28

STATUTES CITED.

Illinois Banking Act, Ill. Rev. Stat. (1949), ch. 16½ § 12 .....3, 14

National Banking Act (McFadden Act), 44 Stat. 1224-1226, 48 Stat. 190-191, 12 U. S. C. § 34a..... .....4, 8, 11, 14, 17, 18, 21-26

Act of Congress of August 24, 1937, 50 Stat. 751; 28 U. S. C. § 2403..... 28

PAGE

OTHER AUTHORITIES.

Illinois Attorney General's Report and Opinions, 1927, pp. 316, 319.....18, 21

Comment, 17 Univ. of Chi. Law Rev. 512, 513, 514 (1950) 5

Annual Report of the Comptroller of the Currency (1928), pp. 233-234; Id. (1929), pp. 246-247; Id. (1930), pp. 26-27; Id. (1931), pp. 193-194; Id. (1932), p. 145; Id. (1933), p. 156; Id. (1934), p. 188; Id. (1938), p. 207; Id. (1946), pp. 25-27.....17, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 789

MARGARET DE KORWIN, Individually, and as Executrix of the Estate of Joseph Maria de Korwin, deceased, and JOHN EDWARD SULLIVAN,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF CHICAGO, a National banking association, individually, and as Trustee of the Estate of Otto Young, deceased, et al.,

Respondents.

BRIEF OF RESPONDENT, THE FIRST NATIONAL BANK OF CHICAGO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

This brief is filed in behalf of respondent, The First National Bank of Chicago, the trustee under the will of Otto Young. Respondent bank opposes the petition for certiorari filed herein by Margaret De Korwin, the substituted plaintiff in the court below, and John Edward Sullivan, who was not a party to either of the judgments below, and therefore has no standing before this Court. To avoid confusion with the petitioners in causes Nos. 771-773 and 790, (which involve issues entirely distinct from the issue here presented) petitioner De Korwin will hereinafter be referred to as the Plaintiff.

The fourteen persons named by plaintiff as respondents to her petition, include, in addition to respondent bank, nine adult beneficiaries under the will of Otto Young, two general guardians for infant beneficiaries, the Guardian *ad Litem* for two infant beneficiaries, and the special trustee for unborn heirs. In the courts below all nine of these adult beneficiaries affirmatively supported the administration of the trust by this respondent.[1] The general guardians stated that they would abide the decision of the court but suggested that plaintiff's contentions were purely technical, involved no charge of maladministration, and might well result in substantial injury to the trust estate.[2] The special trustee for unborns took no position on this issue.[3] The Guardian *ad Litem*, however, consistently supported the plaintiff on all issues, but has not joined in the petition for certiorari.

Opinions Below.

The opinion of the District Court (R. 399) is reported at 84 F. Supp. 918. The opinion of the Court of Appeals (R. 484) is reported at 179 F. 2d 347.

Jurisdiction.

Plaintiff invokes the jurisdiction of this Court under 28 U.S.C. § 1254.

---

[1] See Brief of Appellant Koch, pp. 3, 20-25; Reply Brief p. 2; Brief of Appellant Pratt, et al., pp. 3-4, 13-23; Reply Brief pp. 16-29.

[2] R. 375-376; See Brief of Dorothy Dilley Kaufman, Guardian, at pp. 2, 12; Brief of Jane Catherine Pulitzer, Guardian, at p. 3.

[3] R. 162-163, 372.

Record.

The Court has before it the following:

(a) The printed record filed with this Court in Cause No. 696, O.T. 1946, when review of the Court of Appeals decision on the question of jurisdiction was sought. It has been stipulated that this document may be considered a part of the record on this appeal (R. 480-481). It will be cited as "No. 696, R. —."

(b) The printed record of proceedings subsequent to this Court's denial of certiorari in No. 696. O.T. 1946. This document will be cited as "R. —."

(c) Certain Exhibits which were not printed. They will be cited as "Def. Ex. —."

(d) The Briefs filed in the court below. Plaintiff has lodged with the Court a certified copy of each of the briefs filed by this respondent in the Court of Appeals. Respondent subsequently lodged with the Court the entire set of briefs filed in the Court of Appeals. Appropriate reference will be made to such of these briefs as are cited.

STATUTES INVOLVED.

Illinois Banking Act.

Section 12: "Whenever the board of directors, managers or trustees of any corporation having banking powers existing by virtue of any general or special law of this State . . . may desire . . . to consolidate such corporation with any other corporation having banking powers which may hereafter exist, they may call a special meeting . . . Such . . . consolidation of one corporation with another shall not affect . . . causes of action nor the rights of persons in any particular. . . ." Ill. Rev. Stat. (1949) ch. 16½, § 12.

(This provision has been in force since 1888.)

National Banking Act (McFadden Act).

"Any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same State, county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon. . . . No such consolidation shall be in contravention of the law of the State under which such bank is incorporated." 44 Stat. 1224-1226, as amended, 48 Stat. 190-191. 12 U.S.C. § 34a.

QUESTION PRESENTED.

Whether the law of the State of Illinois was contravened by the consolidation in 1933 of this respondent, a national bank, with the First Union Trust & Savings Bank, an Illinois banking corporation, pursuant to the provisions of the McFadden Act (44 Stat. 1224-1226, 48 Stat. 190-191, 12 U.S.C. § 34a).

Plaintiff's Theory.

Plaintiff argues that the State of Illinois has not given its consent to the consolidation of Illinois banks with national banks, and that, as a matter of Illinois law, the absence of such consent is the equivalent of an express prohibition against such consolidations.

Respondent Bank's Theory.

Respondent bank contends that the State of Illinois—through its legislature, through its courts, and through its executive officials—has unequivocally consented to consolidations between Illinois banks and national banks. In fact, the very consolidation involved in the instant case was sustained by the Illinois appellate courts in a case

in which this Court denied a certiorari petition presenting precisely the same question raised by the instant petition.

Furthermore, apart from the merits, the Court should exercise its discretion to deny certiorari because (a) the question now presented was not properly raised in the courts below, and (b) the question is purely a matter of state law.

STATEMENT OF FACTS.

Plaintiff states that in 1933 respondent bank, acting in contravention of Illinois law and contrary to the intent of Otto Young, "seized" the assets of the Otto Young trust estate. (Pet. 4.) The events leading up to this so-called seizure may be briefly outlined.

From 1888 until the date of his death in 1906, Otto Young owned a substantial stock interest in respondent, The First National Bank of Chicago.[4] In 1903 he took an active part in the formation of the First Trust and Savings Bank, an Illinois corporation, which was formed as a corporate affiliate of respondent national bank primarily for the purpose of administering trusts[5] Throughout its existence the First Trust was subject to exactly the same ownership, control and management as respondent.[6] From December of 1903 until his death three years later, Otto Young served as a director of both banks.[7]

In 1905 Otto Young executed his will naming the First Trust as his executor and trustee.[8] The will provided

---

[4] Def. Ex. 2, 3, 5, 6, 30; R. 314-316.

[5] Def. Ex. 3-15, 20, 30-32; R. 314-316. See Comment, 17 Univ. of Chi. Law Rev. 512, 513-514 (1950).

[6] Ibid.

[7] Def. Ex. 3, 4; R. 314-316.

[8] R. 150-158, 400-401.

that in the event the trustee "shall refuse to qualify or act, or further act, as trustee," a court should appoint a new trustee with the approval of at least one-half of the group comprising his widow and then living children.[9]

After the death of the testator in 1906 the First Trust accepted the trusteeship.[10] Neither the First Trust nor its corporate successors by consolidation ever refused to act as trustee. As required by the will, every year the trustee has accounted to the beneficiaries.[11] No beneficiary has ever criticized these accounts, or, with the exception of plaintiff, ever sought an accounting in court. The only time this trust has had to bear the expense of a court accounting was after the death of Otto Young's widow in 1916, when the trustee found it necessary to obtain judicial instructions with respect to the distribution of certain income.[12]

In 1929 the First Trust entered into a consolidation with the Union Trust Company, another Illinois banking corporation.[13] The resulting Illinois corporation took the name First Union Trust and Savings Bank.[14] First Union continued to act as the trust affiliate of respondent national bank, subject to the same ownership and control as respondent, and continued the administration of the trusts previously administered by First Trust.[15]

---

[9] R. 157, 422.

[10] No court approval of the acceptance of a testamentary trust is required in Illinois, and none was obtained.

[11] R. 318-320.

[12] R. 401-402. Illinois law does not require a court accounting of testamentary trusts.

[13] Def. Ex. 17-19; R. 250-254, 315, 403.

[14] Def. Ex. 21; R. 146, 315.

[15] R. 251; Def. Ex. 17, p. 3; R. 315.

After the 1929 consolidation the Otto Young trust was administered by the same personnel as before.

In 1933 the First Union and respondent entered into the consolidation which is attacked in plaintiff's petition for certiorari.[16] This consolidation, like all other consolidations of Illinois banks with national banks, was specifically approved by the Auditor of Public Accounts of the State of Illinois,[17] and by the Comptroller of the Currency of the United States, the officials respectively charged with the chartering and supervision of state and national banks.[18] In practical effect the national bank merely absorbed its state affiliate. The same personnel continued to administer the Otto Young trust after the 1933 consolidation as well as after the 1929 consolidation.

History of this Litigation.

In 1943, Count Joseph de Korwin, a citizen of Poland, commenced this action (1) to establish an interest in the Otto Young trust, and (2) to require respondent bank to account in court as a trustee *de son tort*.[19] Federal jurisdiction, which was predicated on diversity of citizenship, was successfully challenged in the District Court,[20] but ultimately sustained on appeal.[21]

In the pleadings no attack was made on the validity of the 1933 consolidation. In her second amended complaint, filed after the appeal on the question of jurisdiction and after she had been substituted as plaintiff, the present

---

[16] Def. Ex. 22-29; R. 146-147, 315, 403.
[17] Def. Ex. 28; R. 315.
[18] Def. Ex. 27; R. 315.
[19] No. 696, R. 3-31.
[20] No. 696, R. 161-163.
[21] See 156 F 2d. 855, cert. den. 329 U. S. 795 (1946).

plaintiff specifically alleged the 1933 consolidation without questioning its validity.[22]

Her claim that there was a vacancy in the trusteeship was based on the contention that the 1929 consolidation of two Illinois corporations, though valid, was a "refusal to further act as trustee" within the meaning of the successorship clause of Otto Young's Will.[23] Accordingly, she argued, the 1929 consolidation had the effect of creating a vacancy. Since, as she further argued, the alleged

---

[22] In her second amended complaint plaintiff alleged:

> "that on July 17, 1933, the First Union Trust and Savings Bank merged with and into The First National Bank of Chicago, a national banking association, pursuant to approval on such date of a certificate in that behalf by the Auditor of Public Accounts of the State of Illinois, and pursuant to a certificate of consolidation and merger issued on July 17, 1933, by the Comptroller of Currency of the United States under the provisions and by authority of the National Banking Act, or more specifically the act of Congress known as the McFadden Act of 1927." (R. 146-147.)

See also paragraph 7 of the Cross-Claim filed by the Guardian Ad Litem (who has consistently supported plaintiff in this litigation). He alleged:

> "That the First Trust and Savings Bank of Chicago, after its consolidation with the Union Trust Company and after changing its name to First Union Trust & Savings Bank, consolidated with the First National Bank of Chicago, defendant herein, upon the terms and conditions set forth in said Consolidation Agreement, by the terms of which the First National Bank of Chicago, defendant herein, assumed all the liabilities of the First Union Trust & Savings Bank, and among said liabilities the said First National Bank of Chicago assumed the liabilities of the First Trust & Savings Bank and First Union Trust & Savings Bank as trustees de son tort of the Last Will and Testament of Otto Young, deceased, and should be required to account for all the liabilities chargeable to the First Union Trust and Savings Bank as such trustees de son tort." (R. 182-183.)

[23] R. 145-148.

vacancy was never filled by the procedure prescribed in the will, it supposedly followed that the trust had been administered by a trustee *de son tort* since 1929.

Respondent bank answered denying plaintiff's interest in the estate, and hence her standing to challenge its trusteeship, and denying that there had ever been a vacancy.[24]

The District Court held (1) that plaintiff had a vested interest in the *corpus* of the estate[25] and (2) that the 1929 consolidation created a vacancy in the trust because it was a "refusal to further act" within the meaning of the Will.[26] In the District Court no attack was made on the validity of either consolidation; the finding of vacancy was predicated entirely on the *effect of the 1929 consolidation.*

In determining the extent of respondent bank's liability, however, the District Court did have occasion to make a finding with respect to the validity of the 1933 consolidation. Plaintiff sought to impose an absolute liability on respondent for the administration of the trust since the 1929 consolidation.[27] Since, however, the court had found that respondent had been a trustee *de son tort* only since the 1933 consolidation, liability for the 1929-1933 period could not be imposed on respondent unless it had assumed the liabilities of the First Union. Accordingly, and for the benefit of plaintiff, the District Court expressly found that

---

[24] R. 226-244.
[25] R. 408-421.
[26] R. 422-427.
[27] R. 146-148.

respondent assumed the 1929-1933 liability *by virtue of the 1933 consolidation.*[28]

Having found that the 1929 consolidation resulted in a vacancy and that by virtue of the 1933 consolidation the respondent bank was liable for all losses since 1929, the District Court ordered an accounting and appointed John Edward Sullivan special trustee *pendente lite* to prosecute the accounting.[29] Mr. Sullivan's appointment stemmed solely from the District Court's conclusion that the trust was vacant. He was not a party to the judgment which appointed him.

In seeking a reversal of that judgment in the Court of Appeals, this respondent pointed out in its opening brief that there was no question as to the *validity* of either of the consolidations.[30] It was argued that as a matter of Illinois law the District Court erred in holding that the *effect* of the 1929 consolidation had been to create a vacancy, and that neither the 1929 nor the 1933 consolidation was a "refusal to further act" as trustee within the meaning of the will.[31]

The Court of Appeals unanimously reversed those portions of the decree of the District Court declaring the trusteeship vacant, ordering respondent to account as a trustee *de son tort,* and appointing Mr. Sullivan a special

---

[28] "It is also clear, and this court so finds, as a matter of law, that the First National Bank of Chicago, by virtue of the merger, aforesaid, assumed the liability, if any, of the First Union Trust & Savings Bank as trustee de son tort during the period from the date of the consolidation, aforesaid, February 11, 1929, to the date of the merger, aforesaid, July 17, 1933, inclusive." R. 428; 84 F. Supp. 918, 938.

[29] R. 431-432.

[30] Brief for The First National Bank, p. 15.

[31] Id. 15-55.

trustee *pendente lite*.[32] The court held as a matter of Illinois law that upon consolidation the resulting corporation automatically succeeds to the trusteeships previously held by the constituent corporations.[33] Since Otto Young was presumed to know this rule of Illinois law, and consequently to have appointed not only the First Trust but also its successors by consolidation, the court also concluded that neither consolidation was a "refusal to further act as trustee" within the meaning of his will. These conclusions are not challenged by plaintiff in her petition for certiorari (except, of course, by her rather obvious distortions of the facts under "Matter Involved").

The petition for certiorari questions the *validity* of the 1933 consolidation. The Court of Appeals did not pass on this question. It stated:

> "No one questions the validity of either of the consolidations or that all assets belonging to the trust estate did in fact pass in each instance to the successor consolidated corporation." [34]

The Court of Appeals did, however, devote three paragraphs to a consideration of the *effect* of the 1933 consolidation.[35] In the first paragraph it quoted at length from the McFadden Act. In the second it reviewed pertinent Illinois authorities holding that the McFadden Act is operative in Illinois. And in the third paragraph the court held that the 1933 consolidation had the effect prescribed by the statute.

---

[32] R. 495.

[33] R. 488-495. The Supreme Court of Illinois expressly so held in **Chicago Title & Trust Co. v. Zinser**, 264 Ill. 31 (1914).

[34] R. 489; 179 F. 2d 347, 351.

[35] R. 493-495; 179 F. 2d 347, 353-354.

Thus the Court of Appeals stated that no one questioned the *validity* of either consolidation; held as a matter of Illinois law that the 1929 consolidation had the *effect* of transferring the trusteeship without the necessity of court intervention; and further held that the Federal statutory provision that the 1933 consolidation should have the same effect as the 1929 consolidation was not in contravention of Illinois law.

Plaintiff petitioned for rehearing, contending in Part VI of her Petition that the Court of Appeals "committed a grave oversight in concluding that the validity of the merger between First Union and First National was unchallenged."[36] She first asserted that the question had been raised in the District Court. The record flatly contradicted this assertion.[37] She also quoted at length from the brief filed by Mr. Sullivan in the Court of Appeals. Mr. Sullivan's brief had attacked the validity of the 1933 consolidation at some length. Since, however, Mr. Sullivan was not a party, but was merely seeking to sustain an appointment superseded by the appeal, it may be inferred that the court intentionally disregarded his brief. The petition for rehearing was denied without opinion.[38]

The petition for certiorari is filed on behalf of plaintiff and also Mr. Sullivan. It is respectfully suggested that Mr. Sullivan has no standing before this Court, and that plaintiff cannot lend color to her claim that the ques-

---

[36] R. 545.

[37] Plaintiff's assertion was supposedly based on the portions of the record at R. 178-183, 398-399, and 423-434. These record references are analyzed in this respondent's Reply Brief in the Court of Appeals at pp. 19-22.

[38] R. 643.

tion here presented was properly raised below by joining him as a petitioner for review of a judgment to which he is not a party.[39]

---

[39] The following statement by the Supreme Court of California in **People v. Union Building & Loan Assn.**, 59 Pac. 692 is directly applicable here:

> "O'Neil having no other relation to the case than that of receiver, an officer of the court created by its judgment from which these appeals were taken, has no standing or relation to the case which would authorize him to petition the court for a rehearing, or even to file a brief therein, except as an amicus curiae. In re Pina's Estate, 112 Cal. 14, 44 Pac. 332. He had no right of appeal. He was not a party aggrieved by the judgment from which the appeal was taken, and could not have taken an appeal, nor did the service upon him of the notice of appeal give him any standing in this court. He was not a party to the litigation, and had no interest in behalf of or against either party thereto. The only interest he has is that of retaining an office to which he was appointed by the court by its final judgment in a cause litigated by other parties."

It has long been settled in the federal courts that one who is not a party to a judgment has no right to participate in an appeal therefrom. See **Ex Parte Leaf Tobacco Board Of Trade**, 222 U. S. 578, 581, and cases cited.

ARGUMENT.

I. Plaintiff's Petition assumes the answer to a question of Illinois law which has been decided adversely to her assumption.

Plaintiff assumes—and this assumption is the crux of her petition—that Illinois has not consented to the operation of the McFadden Act in this State. On the basis of this assumption plaintiff seeks to present certain federal questions to this Court. But this case does not present those questions because plaintiff's basic assumption is invalid. We shall first demonstrate the invalidity of the assumption and then comment specifically on each of the so-called questions presented.

A. The State of Illinois has Consented to the Consolidation of Illinois and National Banks.

Ever since 1888 Section 12 of the Illinois Banking Act has authorized the consolidation of an Illinois bank "with any other corporation having banking powers which may hereafter exist • • •" Ill. Rev. Stat. (1949) c. 16½ § 12. This broad language has been construed by the Illinois Appellate Court as giving consent by Illinois to the consolidation of a state and national bank. In holding invalid an attempt to effectuate such a consolidation prior to the enactment of the McFadden Act, the Illinois court recognized that the Illinois Banking Act authorizes state banks to consolidate with national banks. The court stated:

> "The Banking Act of this State, Cahill's St. ch. 16a, grants to State banks the right to consolidate with each other and also with a national bank upon complying with certain conditions." *McRoberts* v. *Minier*, 270 Ill. App. 1, p. 10.

This general statement of the policy of the State of Illinois has been held to be specifically applicable to the very consolidation belatedly attacked by plaintiff in this Court. The case of *The First National Bank of Chicago* v. *Lindberg et al.*, 293 Ill. App. 474; appeal denied, 293 Ill. App. xlv; cert. denied 305 U. S. 636 (1938), is a complete answer to plaintiff's petition.

The Lindberg Case.

In that case the First Union Trust & Savings Bank as trustee under a trust deed brought a bill to foreclose a mortgage on certain properties. While the case was pending, the trustee was consolidated with The First National Bank of Chicago (this respondent) in the transaction referred to herein as the "1933 consolidation." Subsequestly this respondent filed a supplemental bill alleging that it had become trustee by virtue of the consolidation and asking leave to be substituted as plaintiff.

Defendant O'Brien answered by denying the validity of the 1933 consolidation and hence denying respondent's status as trustee. With the issue thus joined, the chancellor specifically found that the 1933 consolidation was valid. As stated by the Illinois Appellate Court:

> "The master reported and the chancellor found and decreed that the First Union Trust & Savings Bank was lawfully and effectively consolidated with the First National Bank of Chicago, which thereby became successor trustee under the trust deed and owner and holder of $4,000 of the bonds secured by the trust deed." 293 Ill. App. 474, 476.

Defendant O'Brien appealed on the ground that the First Union Trust had no power to pass its trusteeship to this respondent by entering into the 1933 consolidation.

The Illinois Appellate Court stated the theory of his appeal to be:

> "• • • that the outstanding and controlling question in this case is as to the powers of the First Union Trust & Savings Bank, under the Illinois statutes, and whether the consolidation of these banks is legal." 293 Ill. App. 474, 478.

Appellant O'Brien made the same arguments and relied on the same authorities as plaintiff does here.[40] The affirmance of the decision of the trial court by the Illinois Appellate Court, in the face of the same arguments here presented, is necessarily controlling on the issue of state law presented to this Federal Court.

The Appellate Court held that the legality of the 1933 consolidation was not subject to collateral attack by a private litigant, but could only be questioned by the Attorney General of Illinois:

> "From the authorities on the question up to this point it is clear that there is but one way to test the question of the legality of the existence of a corporation and its powers, and that is by an action in the nature of *quo warranto,* which, in this State, must be instituted by the Attorney General of Illinois." 293 Ill. App. 474, 481.

The reasons for this conclusion are directly applicable here. For despite her suggestion that she seeks to vindicate a "vital interest" of the State of Illinois (Pet. 12), plaintiff in the present case attacks the 1933 consolidation solely for the purpose of imposing an unconscionable

---

[40] See O'Brien's Petition for Certiorari, No. 356, O.T. 1938, filed in this Court on Sept. 16, 1938. Note also the Illinois Appellate Court's long quotation from **Hopkins Fed. Savings & Loan Assn. v. Cleary, 296 U. S. 315 (1935).** (See 293 Ill. App. at 482-484). O'Brien, like plaintiff here, obviously relied heavily on the **Hopkins** case.

liability on respondent bank. She seeks private gain on purely technical grounds without regard for the interests of the State of Illinois. There have been 23 consolidations of Illinois banks with National banks under the McFadden Act.[41] All 23 would be invalidated by an acceptance of plaintiff's contention. There are sound considerations of policy for the Illinois court's conclusion "that the proper procedure would be for the Attorney General of the United States, or the Attorney General of this State to question the legality of the consolidation that took place when the banks were merged." 293 Ill. App. 474, 484-485.

Furthermore, the Illinois Appellate Court in the *Lindberg* case squarely held the McFadden Act to be operative in Illinois.[42] The Illinois court stated:

> "It does not appear from anything called to our attention that it was necessary to specifically authorize the consolidation of a State bank with a national bank to give effect to the powers and authorities conferred by the national act. Therefore, in the absence of a State statute prohibiting such consolidation, the national act applies and is the basis of the authority for the consolidation." 293 Ill. App. 474, 481.

As a matter of Illinois law the Illinois Appellate Court has held that it is not necessary for the Illinois Legislature to pass enabling legislation to specifically authorize

---

[41] See Annual Report of the Comptroller of the Currency (1928), pp. 233-234; Id. (1929) pp. 246-247; Id. (1930), pp. 26-27; Id. (1931) pp. 193-194; Id. (1932) p. 145; Id. (1933) p. 156; Id. (1934), p. 188; Id. (1938), p. 207; Id. (1946), pp. 25-27.

[42] Plaintiff concedes that the court in the **Lindberg** case "held that the McFadden Act authorized the consolidation upon which the First National Bank's status as substituted plaintiff depended." (Pet. 34-35)

consolidations under the McFadden Act. The Illinois court has declared the policy of the State to accept the Federal statute as sufficient statutory authority for such consolidations. This important statement of policy was implicitly adopted by the Illinois Supreme Court when, without opinion, it denied O'Brien's petition for leave to appeal to that court. (293 Ill. App. xlv)

After the decision of the Illinois Supreme Court, defendant O'Brien sought a writ of certiorari from this Court. See No. 356, O.T. 1938. An examination of that petition reveals a striking similarity to the petition filed herein. Certiorari was denied. 305 U. S. 636 (1938).

The Illinois Attorney General.

Since the *Lindberg* case indicates that the Illinois Attorney General is the only party who may question the validity of the 1933 consolidation, it is appropriate to refer to his officially reported opinion on this issue. In response to an inquiry by the Illinois Auditor of Public Accounts he rendered an opinion which concluded with the following paragraph:

> "In view of the above, I am of the opinion that a bank organized under the laws of the State of Illinois may legally be consolidated with a national bank, the consolidated entity coming under the jurisdiction of the National Banking Act, and that by such consolidation the constituent corporations by operation of law cease to exist and the new corporation accedes to all the rights, property, franchise and interest, including the right of succession as trustee, executor or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by the constituent banks." Illinois Attorney General's Report and Opinions, 1927, 316, 319.

Relying on this opinion by the chief legal officer of the State, the Auditor of Public Accounts has subsequently approved of 23 consolidations of Illinois banks with national banks.[43] For 23 years the Executive branch of the State Government has followed the policy expressed by the courts in the *Lindberg* and *McRoberts* cases.

The silence of the Illinois General Assembly in the face of this consistent administrative and judicial interpretation of the Illinois statute of 1888 and of the policy of the State since 1927 signifies legislative approval of the operation of the McFadden Act in Illinois. To paraphrase Mr. Justice Cardozo's language in *Hopkins Fed. Savings & Loan Assn.* v. *Cleary*, 296 U. S. 315, 343 (1935): The time has gone by for the State of Illinois to vindicate her majesty. Not merely by acquiescence, but by substantial affirmative conduct, Illinois has consented to consolidations pursuant to the McFadden Act.

The Hopkins Case.

Indeed, the *Hopkins* case, on which plaintiff places her principal reliance, is itself a sufficient answer to her petition. There the Court held that the power of Congress was not competent to authorize the conversion of a Wisconsin building and loan association into a federal association "against the protest of Wisconsin." 296 U. S. at 343. Since Illinois has not protested the 1933 consolidation, this holding is not material here. Instead, the significance of the *Hopkins* opinion is the Court's explanation of why *Casey* v. *Galli*, 94 U. S. 673 (1876) was correctly decided.

Speaking for a unanimous Court, Justice Cardozo set out the facts of the *Galli* case in some detail. 296 U. S.

---

[43] See note 41, supra.

at 341-343. In that case a private litigant challenged the validity of the conversion of a Louisiana bank into a national bank. "The state did not oppose the conversion, though it was not shown to have consented. The reorganized corporation did business for more than two years, when it failed and a receiver was appointed by the Comptroller of the Currency." *Id.* 341-342. In subsequent litigation between the receiver and a shareholder, the latter contended that the conversion of the Louisiana bank into a national bank was void for want of authority from Louisiana.

The Court rejected this contention on two independent grounds which Justice Cardozo stated inversely to the order in which they appeared in the *Galli* opinion.

> "Thus stated they are these: (a) The defendant was estopped from contesting the validity of the change after standing by for over two years without making his objection known; and (b) apart from any estoppel, 'no authority from the State was necessary to enable the bank so to change its organization.'" *Id.* 342.

Justice Cardozo then noted that the case did not present a constitutional question. The validity of the Federal statute was taken for granted, inasmuch as the State of Louisiana, as well as the private litigant, had acquiesced in the conversion.

> "The assumption was one that could hardly be avoided when the controversy was viewed in the setting of the facts. Louisiana, like the defendant shareholder, had apparently acquiesced in the attempt of the central government to take over the state banks. The time had gone by to vindicate her majesty. What she might have done if she had been vigilant is a question not before us." *Id.* 343.

Thus the basis of the *Galli* decision as explained by Justice Cardozo was the fact that for over two years no

objection had been raised to the conversion. In view of this passage of time, the Court properly held (a) that the private litigant was estopped, and (b) that "no authority from the State was necessary to enable the bank so to change its organization."

Justice Cardozo's reasoning applies *a fortiori* to the case at bar. In the *Galli* case the State had neither opposed nor consented to the conversion. Here the State has affirmatively consented to 23 McFadden Act consolidations, including the particular transaction involved in the instant case. There, after "more than two years," the time had gone by for Louisiana to vindicate her majesty. Here, some 17 years have elapsed since the 1933 consolidation, and 23 years have passed since Illinois first consented to the consolidation of Illinois banks with national banks under the McFadden Act.[4] Certainly, when Illinois permits no one but the Attorney General to vindicate her majesty, this Federal Court will not entertain this belated attack on the 1933 consolidation by a private litigant. It is far too late for even the Attorney General to question its validity. As for plaintiff, she is not only too late; she never had any standing to raise this question at any time.

B. Plaintiff's so-called "Questions Presented" may be answered summarily.

Question 1.

Plaintiff first asks whether the McFadden Act is to be construed as conferring powers upon State banks.

If she is asking whether an Illinois Court should hold that an Illinois corporation has the power to consolidate with a national bank, she is asking a question of Illinois

---

[4] See Illinois Attorney General's Report and Opinions, 1927, 316, **supra**, p. 18.

law which has been answered in the affirmative by the Illinois courts. This answer presents no federal question, for the Illinois courts are certainly free to decide whether a consolidation pursuant to the McFadden Act is *ultra vires* an Illinois corporation.

If, on the other hand, she is asking whether a federal court should hold that a state bank has such power, the answer depends upon the law in the state in question. The Illinois answer to this question is binding on the federal courts in this case.

As subsidiary points under her first question, plaintiff suggests that the Federal statute is unconstitutional because it trespasses upon an exclusive domain of the State. But Illinois has consented to the so-called trespass. Clearly, therefore, no question arises under the Tenth Amendment.[45]

Question 2.

Plaintiff next asks whether the McFadden Act is to be construed to modify judicial constructions of State statutes.

The answer is quite obviously in the negative. The Federal Government has no power to tell an Illinois court what an Illinois statute means. Similarly, neither the Federal Constitution nor the McFadden Act requires Illinois to manifest its consent to McFadden Act consolida-

[45] If the Federal Act is inoperative even though Illinois has consented to its operation in this State, it must follow that every McFadden Act consolidation throughout the country is void. A constitutional question affecting the public interest to this extent certainly should have been raised at an earlier stage of the litigation. It was not raised below, as is evident from the fact that the Attorney General of the United States received no notice of any attack on the validity of the Federal statute. See infra, pp. 28-29.

tions by a specific enabling act passed after 1927. There is no Federal rule of law which prevents Illinois from expressing its consent through judicial construction of prior legislation, judicial interpretation of State policy, consistent executive action, or long-continued legislative acquiescence.[46] Illinois has manifested its consent in each of these several ways.

Question 3.

Thirdly, plaintiff asks whether state law controls in determining whether a consolidation under the McFadden Act is "in contravention of the law of the state."

The answer is quite obviously in the affirmative. The question is definitely one of state law and it has been answered in Illinois by the Illinois courts.

Plaintiff argues, however, that the Illinois courts answered this question incorrectly because a McFadden Act consolidation is really a merger which is not authorized (and hence is forbidden) by Illinois law. The gist of the argument is that Illinois could properly consent to a consolidation of a state and national bank if the consolidation terminated the technical corporate existence of the consolidating banks, but that she should not consent to the consolidation if the constituents survive. There are three short answers to this argument.

First, it is not for this Court to decide whether, as a matter of state law, Illinois should have consented to consolidations under the federal statute. The important thing is that the State has in fact given its consent.

---

[46] Plaintiff has artfully concealed the real thrust of her argument. On the surface she purports to be protecting a "vital interest" of the State. In final analysis, however, she is contending that Federal law forbids the State to consent to consolidations of state and national banks in any manner but one, viz., by a specific enabling act.

Second, no policy of the State is contravened by prescribing that in a technical sense the corporate existence of the Illinois bank survives. The practical and substantive consequences of a McFadden Act consolidation are the same as the consequences of a consolidation of two Illinois banks.[47] Under Illinois law the Otto Young trusteeship automatically survived the 1929 consolidation; under both Illinois law and Federal law the same consequence ensued from the 1933 consolidation. It does not appear that Illinois attaches any real significance to the effect of the consolidation on the technical existence of the constituents.[48]

Third, even if it be assumed that a particular consequence of a McFadden Act consolidation is contrary to Illinois law, it does not follow that the consolidation itself is invalid. The validity of the consolidation in *Ex Parte Worcester National Bank,* 279 U. S. 347 (1929) was sustained even though one of the consequences prescribed by the McFadden Act was forbidden by local law. That case squarely holds that the Federal statute applies to the

---

[47] The Illinois Banking Act expressly provides that a consolidation shall not affect "the rights of persons in any particular." Ill. Rev. Stat. ch. 16½ § 12. See **Albers v. McNichols,** 301 Ill. App. 551, 558 (1939); **Chicago Title & Trust Co. v. Zinser,** 264 Ill. 31 (1914).

[48] Compare the following statement by the Illinois Supreme Court with plaintiff's argument:

> "Much is said in the argument about the terms 'merger' and 'consolidation', and distinctions are sought to be drawn between the two forms of contract. We do not attach great importance to this line of argument. While there appears to be a distinction recognized by most of the authorities between a 'merger,' strictly speaking, and a 'consolidation,' still the terms are not always used with strict accuracy. Besides, the agreement under consideration employs both terms, so that the true intent of the agreement cannot be determined by recourse to the dictionaries." **C. & E. I. R. R. Co. v. Doyle,** 256 Ill. 514, 522, (1912).

extent that it is not contrary to state law. And it is manifest that the provision for technical survival of the constituent corporate entities is severable from the portion of the statute authorizing the consolidation itself, for it was not included in the statute as originally enacted in 1927 (44 Stat. 1224-1226). The question whether Illinois law authorizes this particular technical consequence, has no bearing on the question of the validity of the 1933 consolidation itself.

Question 4.

Finally, plaintiff asks whether any one is denied due process of law by the application of the presumption expressed in *Chicago Title & Trust Co.* v. *Zinser,* 264 Ill. 31 (1914) to the 1933 consolidation.

In the *Zinser* case the Supreme Court of Illinois held that a testator who appoints a corporate fiduciary is deemed to have contemplated the consolidation of the appointed trustee "with any other corporation then existing or that might thereafter be organized," and to have intended the successor corporation to execute his trust. (See 264 Ill. at 35-36.) The basis for this presumption is found in the provision of the Illinois Banking Act which authorizes the consolidation of Illinois banking corporations "with any other corporation having banking powers which may hereafter exist * * *." This provision has been effective continuously since 1888; specifically it was effective in 1905 when Otto Young executed his Will.[49]

The *Zinser* presumption had its source in an Illinois statutory provision that was in effect at the time of Otto Young's death. The basis of this presumption is not found in "Federal statutes enacted after the testator's death"

[49] See Chap. 16a, Sec. 12, Ill. Rev. Stats., 1905.

as plaintiff implies (Pet. 22). As a matter of Illinois law, Otto Young's presumed intent broadly encompassed any lawful consolidation of his appointed trustee. In the instant case this presumption applies to both the 1929 consolidation and the 1933 consolidation. As to the latter, the effect of the presumption is identical with the effect prescribed by the McFadden Act, namely, to transfer by operation of law the Otto Young trusteeship to the consolidated bank.

This presumption is entirely reasonable and has been accepted in many states without, as far as this respondent can determine, ever having been questioned on constitutional grounds.[50] Certainly it is not so unreasonable and arbitrary as to deprive anyone of due process of law.

II. The issue of validity of the 1933 consolidation was not properly raised below.

In the District Court plaintiff not only failed to raise the issue here presented,[51] but even relied on the 1933 consolidation as a basis for imposing liability on this respondent for four years prior to 1933.[52] In the Court of Appeals plaintiff sought to raise the question of validity by a petition for rehearing in which she incorporated a

---

[50] See e.g., the following cases applying the Zinser rule to consolidations occurring after the death of the testator: **Adams v. Atlantic Natl. Bank**, 155 So. 648 (Fla., 1934); **Citizens and Southern Natl. Bank v. Connor**, 11 S.E. 2d (S. Car., 1940); **Mercantile Trust Co. v. San Joaquin Agricultural Corp.**, 265 Pac. 583 (Calif. 1928); Cf. **First Natl. Bank v. Harry E. Chapman Co.**, 22 S.W. (2d) 245 (Tenn. 1929).

[51] If by way of reply, anyone should contend that an attack on the validity of the 1933 consolidation was made in the District Court, it is respectfully requested that this Court refer to pages 19-22 of the Reply Brief filed by this respondent in the Court of Appeals where such a representation to the Court of Appeals is analyzed.

[52] R. 428.

long quotation from the brief filed by Mr. Sullivan.[53] Presumably this quotation stood on the same footing as Mr. Sullivan's original brief which was apparently ignored by the Court of Appeals because Mr. Sullivan had no standing in the cause. The petition did not advance any arguments which could not have been raised at an earlier stage of the case.

In this Court plaintiff tries to create the impression that the issue was properly raised below by setting out in an Appendix portions of the briefs filed by this respondent in the Court of Appeals.[54] In its Reply Brief respondent met on their merits the arguments advanced by Mr. Sullivan,[55] but only after pointing out to the court that the issue was not properly before it.[56] In this connection it is of interest that plaintiff lodged with this Court only this respondent's briefs below; she neglected to lodge her own briefs with this Court. Since, however, respondent has lodged here a complete set of the briefs in the court below, the Court will have the opportunity to search through plaintiff's briefs to ascertain the extent of her earlier attack on the validity of the 1933 consolidation.

The Court will search in vain for any citation of any of the following Supreme Court decisions, even though plaintiff now contends (in her "Reasons for Allowance

---

[53] R. 547-555.

[54] App. 30-42.

[55] See Reply Brief of the First National Bank, 19-41 (Quoted in part in Plaintiff's Appendix, 34-42).

[56] Id. 2-6, 19-22 (This portion of the Reply Brief is omitted from Plaintiff's Appendix).

of Certiorari," Pet. 11-20) that the Court of Appeals failed to give proper effect to all of them:

> Ex Parte *Worcester National Bank*, 279 U. S. 347 (Pet. 13-16);
>
> *Davis* v. *Elmira Savings Bank*, 161 U. S. 75 (Pet. 12);
>
> *Knights of Pythias* v. *Meyer*, 265 U. S. 30 (Pet. 18);
>
> *Leffingwell* v. *Warren*, 2 Black 599 (Pet. 18);
>
> *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639 (Pet. 19).[17]

Similarly, in this Court plaintiff asserts that various constitutional questions are presented. None of these constitutional questions was raised in the court below. This is evident from the fact that, although plaintiff is attacking the constitutionality of an important federal statute, no notice of such attack was given to the Attorney General of the United States. Such notice is required by the Act of Congress of August 24, 1937, 50 Stat. 751; 28 U.S.C. § 2403. This requirement is mandatory. See *Garment Workers* v. *Donnelly Co.*, 304 U. S. 243, 249 (1938).

Plaintiff's failure to make her present attack on the validity of the 1933 consolidation at an earlier stage of the case is itself a sufficient reason for denying certiorari. This Court has summarized its practice as follows:

> "This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here. *Duignan* v. *United States*, 274 U. S. 195. There are specially cogent

[17] Nor did Mr. Sullivan cite any of these cases, even though he volunteered a brief attacking the 1933 consolidation in that court.

reasons why this rule should be adhered to when the question involves a practice of one of the great departments of the government." *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225 (1927). See also *Duignan* v. *United States*, 274 U. S. 195 (1927) and cases cited at p. 200.

III. Whether a consolidation is in contravention of the law of a State is a question of State law.

This Court has consistently denied petitions for certiorari presenting the question whether a McFadden Act consolidation is in contravention of the law of a particular state. *First National Bank* v. *Lindberg*, 293 Ill. App. 474, cert. denied 305 U. S. 636 (1938), rehearing denied 305 U. S. 671 (1938); in re *Watkins Estate*, 113 Vt. 126, cert. denied 319 U. S. 757 (1943); *Stevens* v. *First National Bank and Trust Co.*, 173 Ga. 332, cert. denied 284 U. S. 684 (1932); *Hofheimer* v. *Seaboard Citizens Natl. Bank of Norfolk*, 154 Va. 896, cert. denied 283 U. S. 855 (1931). An appropriate reason for denying the petitions for certiorari in every one of these cases, was that, in final analysis, the petitioner was asking the Court to review a question of State law. That reason applies with particular force to the instant petition.

Respectfully submitted,

EDWARD R. JOHNSTON,
J. F. DAMMANN,
HAROLD V. AMBERG,
JOHN W. KEARNS,
Attorneys for Respondent, The First National Bank of Chicago.